

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA

v.

CHRISTOPHER CANTWELL

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20-cr-06-01-PB

September 25, 2020

8:45 a.m.

TRANSCRIPT OF JURY TRIAL
DAY FOUR - MORNING SESSION
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

For the Government:

John S. Davis, AUSA
Anna Z. Krasinski, AUSA
U.S. Attorney's Office

For the Defendant:

Eric Wolpin, Esq.
Jeffrey S. Levin, Esq.
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Court Reporter:

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United States District Court
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I N D E X

WITNESS: Direct Cross Redirect Recross

CHRISTOPHER CANTWELL

(Previously transcribed under separate cover)

P R O C E E D I N G S

(IN COURT - NO JURY PRESENT)

THE COURT: All right. Do you want to discuss the jury instructions with me?

Just to set the stage, I submitted a first draft of the instructions to the parties prior to trial. I provided them with a revised draft yesterday and met after the close of court with a representative from each side with the revised instructions. We discussed several modifications that the parties were proposing, most of which I agreed to. I put together another revision and provided it to the parties at about 8 o'clock today.

I tried to accurately do what I told you I would do last night, but I might not have. If I haven't or if there are other issues, I would welcome a chance to hear you on them. Of course you'll preserve any arguments you have such as I know the government, excuse me, the defense will register an objection to my instruction about provocation not being a defense. You don't need to preserve that here. You've made that very clear to me.

But if there's any kind of constructive change that you didn't raise with me yesterday or that you don't think I executed faithfully, I'm happy to hear first from the defense and then the government.

MR. LEVIN: Your Honor, I don't have my finger on

1 it, but I do recall that there is some case law that talks
2 about intent to extort. It says here: Means to act with the
3 intent to obtain something of value from another person with
4 that person's consent but induced by threat and force,
5 violence or fear.

6 I thought there was a part of it that should be
7 wrongfully, you know, something that you're not entitled to.

8 THE COURT: Yeah.

9 MR. LEVIN: If somebody takes your -- steals your
10 purse and you threaten to get it back, that's not extortion.
11 So there has to be a wrongful element of the request.

12 THE COURT: Okay. I think that's an interesting
13 point. I wish we had talked about it last night.

14 MR. LEVIN: It just occurred to me, your Honor.
15 I'm sorry.

16 THE COURT: Yeah, that's all right. I will -- I
17 think that is an interesting point.

18 So the argument would be say, for example, you're
19 trying to use self-help to get back your own property. Can
20 you commit this crime of extortion as threat by threatening to
21 kill the person that wrongfully stole your car if he doesn't
22 give it back to you.

23 MR. LEVIN: Right.

24 THE COURT: And you're saying I don't think you can
25 commit the crime if the evidence is that it's your property

1 and you have a right to it even if you use threatening means
2 to get it back.

3 MR. LEVIN: That's correct.

4 THE COURT: Okay. Well, that's an interesting
5 theory. I'll try to explore it.

6 Have you got something to say on that point?

7 MR. DAVIS: Only, Judge, there is a definition in
8 the Hobbs Act that's useful I think. So 18 U.S.C. Section
9 1951.

10 THE COURT: My definition of threat comes from the
11 Hobbs Act. Is there an intent to extort definition in the
12 Hobbs Act?

13 MR. DAVIS: I'm reading from 1951(b)(2):

14 The term extortion means the obtaining of property
15 from another with his consent induced by wrongful --

16 THE COURT: Yeah, that's what I'm recalling.

17 MR. LEVIN: Yeah, that's what I was thinking.

18 MR. DAVIS: We would not object to that.

19 THE COURT: So we add the word wrongful.

20 Unfortunately, I didn't bring my reading glasses
21 down.

22 Vinny, would you -- for your sake -- I've got them
23 up in the my office. Would you run up there and get them for
24 me? You can, you know, just touch them with a --

25 THE CLERK: I have an extra pair of yours.

1 THE COURT: No, that's all right. Can you get mine
2 for me? These are mine? Okay. I've got like 20 pair around
3 here. Thank you.

4 MR. DAVIS: And we did propose the use of wrongful
5 in our proposed instruction.

6 THE COURT: Yeah. Let me just figure out the exact
7 place to put it.

8 By the way, I'm not absolutely convinced on the
9 hypothetical that I presented that you could not be found
10 guilty of extortion under those circumstances because the
11 question of what's wrongful, can the threat be wrongful, force
12 that you're not legally entitled to use, can you threaten
13 force that you -- because you can't use deadly force on
14 somebody to recover your own property, and so threatening the
15 use of deadly force to recover your own property -- at least
16 there's an argument, I haven't studied it, that that would be
17 a wrongful threat. I don't think you can simply say if you're
18 entitled to it that it wouldn't be wrongful because the means
19 can make it wrongful even if there's an entitlement to the
20 property.

21 Do you see what I'm saying?

22 MR. DAVIS: Yes.

23 THE COURT: So in this case if it were to be argued
24 that he has a right to be left alone and not have his site
25 harassed, and he can therefore threaten to do anything he

1 wants to stop that and it's not an extortion or threat, no,
2 that doesn't strike me as the way the law would work, but I'm
3 happy to insert the word wrongful at the appropriate place.

4 So to act with an intent to extort means the -- how
5 about this: To act with the intent to wrongfully obtain
6 something of value from another person with that person's
7 consent induced by threat, force, or fear, or should it be
8 means to act with the intent to obtain something of value from
9 another person with that person's consent but wrongfully
10 induced by threat?

11 Where do you want wrongfully?

12 MR. LEVIN: In the statute it says, "Induced by
13 wrongful use of actual or threatened force, violence, or fear,
14 or under color of official right."

15 And I'm presuming "color of official right" means
16 pretending that you have some sort of legal right to it, I
17 guess.

18 THE COURT: All right, but we're not dealing with
19 the Hobbs Act here.

20 MR. LEVIN: Right.

21 THE COURT: So I'm trying to figure out where you
22 want me to insert the term here.

23 MR. LEVIN: Induced by wrongful use of threatened
24 force, violence, or fear.

25 THE COURT: Should wrongful be used in describing

1 the threat or should wrongful be used in describing the
2 intention with which the threat is made?

3 MR. LEVIN: I think it's --

4 THE COURT: Give me the definition of the Hobbs
5 Act. Give me the cite to the Hobbs Act again.

6 MR. DAVIS: It's 1951(b)(2), and it uses it in the
7 second part of the definition. "The term extortion means the
8 obtaining of property from another, with his consent, induced
9 by wrongful use of actual or threatened force, violence,
10 fear --"

11 THE COURT: So it describes the use of force, all
12 right? So wrongful use -- so force can be wrongful even if
13 you have a right to the property if the force is not lawful
14 force, right?

15 MR. DAVIS: Right.

16 THE COURT: So that would be wrongful. So it
17 clearly does refer not to in the hypothetical I presented
18 merely whether the person has a right to recover the property
19 but whether they have the right to use the means that's being
20 threatened, right?

21 MR. DAVIS: Right.

22 THE COURT: So that could mean if they are
23 unlawfully -- if they're threatening to use force that they
24 cannot lawfully use to obtain property, even if it's their
25 own, it still would qualify under that definition, right?

1 MR. DAVIS: That's correct.

2 THE COURT: But here we're talking about not the
3 crime of extortion. We're talking about the crime of
4 threatening to extort, right? So I'm trying to figure out --
5 extortion by threat, rather.

6 So if I look on page 13 -- let me hear, Mr. Levin,
7 where on page 13 or page 14 should I insert the word wrongful
8 or wrongfully?

9 MR. LEVIN: Well, first of all, on page 13 in that
10 first section -- no. I'm looking at page 14, "To act with an
11 intent to extort means to act with the intent to obtain
12 something of value from another person with that person's
13 consent but induced by," and then you would insert, "the
14 wrongful use of threatened force, violence, or fear."

15 THE COURT: Okay. Would that satisfy you? Is that
16 where you want wrongful?

17 MR. LEVIN: Yes.

18 THE COURT: All right.

19 MR. DAVIS: I think my only addition would be
20 actual or threatened. Actual or threatened use.

21 MR. LEVIN: By wrongful use of actual or threatened
22 force?

23 MR. DAVIS: The wrongful use of actual or
24 threatened force, violence, or fear. I think that's correct.

25 MR. LEVIN: Yeah.

1 THE COURT: Okay. Well, Mr. Davis, so one of the
2 reasons I didn't put that in was because you can commit this
3 crime by using force, but this indictment doesn't charge that
4 Mr. Cantwell ever used force.

5 Am I making too much of that distinction?

6 MR. DAVIS: No, but arguably he actually used fear.
7 He induced fear and he followed through. There was an actual
8 use of fear.

9 THE COURT: Okay. That's fair.

10 So propose the language you want to use, Mr. Davis,
11 to modify what Mr. Levin suggested.

12 MR. DAVIS: So on page 14 the first clause as is
13 all the way through with that person's consent as is, and
14 then, but induced by the wrongful use of actual or, and then,
15 threatened force, violence, or fear. So just insert, the
16 wrongful use of actual or.

17 THE COURT: Give it to me one more time.

18 MR. DAVIS: So insert -- where it says, but induce
19 by threatened force now, insert between by and threatened, so
20 it reads, but induced by the wrongful use of actual or.

21 MR. LEVIN: We agree with that.

22 THE COURT: All right. Where there's agreement,
23 I'm inclined to go along.

24 So that it's clear -- I mean, when I tried to
25 square grammatically what you have jointly proposed with the

1 indictment, the one thing that doesn't work perfectly for me
2 is this instruction would allow the jury to convict on a
3 theory of actual use of -- I guess I'm having trouble with the
4 expression actual use of threatened force. That seems to me
5 to be confusing.

6 MR. LEVIN: I think it's the wrongful use of actual
7 or threatened, and that modifies force, violence, or fear. I
8 don't think actual or threatened just modifies force. That
9 would be the way I would read it.

10 THE COURT: So this is a -- if I were construing a
11 statute this way, I would be saying this is a rule of the last
12 antecedent problem.

13 The way it's written without actual and the way I
14 understand it is, one way to do it is threatened force, the
15 other way of doing it is threatened violence, and the other
16 way of doing it is fear.

17 So the use of -- so another way to do this is the
18 wrongful use of threatened force, threatened violence, or
19 fear.

20 Do you see what I'm saying?

21 MR. LEVIN: Yeah.

22 THE COURT: I'm willing to do it that way, but if
23 you still prefer the way you've jointly proposed, I will defer
24 to the parties' joint view, but don't complain about it on
25 appeal when I've told you there's another way to do it and

1 you've told me that's what you want.

2 So the two ways I would think is the way you've
3 suggested, which I'm willing to defer to, or that it would be
4 say: By the wrongful use of threatened force, threatened
5 violence, or fear.

6 Do you have a position on which of those you
7 jointly prefer?

8 MR. DAVIS: Either is fine with the government.

9 MR. LEVIN: I agree, your Honor. I'm not wedded to
10 it.

11 THE COURT: All right. So I'm going to do it my
12 way then: But induced by the wrongful use of threatened
13 force, threatened violence, or fear. And that's a play off of
14 the Hobbs Act definition.

15 That's the only place where I need to make that
16 change, right? Okay. So I'm going to do it my way but by
17 agreement of the parties that it's an acceptable way.

18 All right. Anything else anybody has for me?

19 MR. LEVIN: Just wondering when you would like us
20 to put on the record our objection to the provocation is not a
21 defense instruction.

22 THE COURT: I advise all defendants to put their
23 objections on after the instruction is given because there's
24 some troubling case law for the defense that can suggest that
25 you might waive an instruction.

1 Like in the event that I misread something, that
2 I've told you I'm going to do X but I actually say something
3 different to the jury, you really have to -- to make
4 bulletproof any appeal of the charge, you should wait till
5 after the instruction. So once the instruction has been given
6 I would advise you to -- we'll put the headsets on and you can
7 say, Judge, I just want to preserve my objection to the use of
8 the provocation instruction because I don't believe it's
9 warranted to give a provocation is not a defense under these
10 circumstances, and that would preserve it. So wait till
11 afterwards just to be sure.

12 MR. LEVIN: I was hoping I would have an
13 opportunity to do it before because I was hoping I might
14 persuade you not to give the instruction. Once the
15 instruction is given, it's too late for that.

16 THE COURT: I mean, I think you already did once
17 last night off the record, but on the record do you have
18 something new to add or something different?

19 MR. LEVIN: Yes, I would.

20 THE COURT: Okay. Well, we'll probably be in
21 charging right after lunch or at least having closings right
22 after lunch. So at the lunch break we'll stop and you can
23 give me your new argument about provocation, all right?

24 MR. LEVIN: Okay. Thank you.

25 THE COURT: Anything else?

1 MR. LEVIN: No, your Honor.

2 THE COURT: Okay.

3 MR. DAVIS: Only, Judge, one on page 15.

4 THE COURT: Yes.

5 MR. DAVIS: The word between should be used to make
6 that Count 2 description clearer. It should say between on or
7 about June 15th.

8 THE COURT: Yes, I made that change in the draft,
9 it didn't get picked up, because that's the actual quote.

10 Isn't it between in or about in your indictment?

11 MR. DAVIS: It is --

12 THE COURT: I think you use between in or about.

13 MR. DAVIS: It says between -- this is Count 2. So
14 it's between on or about June 15th.

15 THE COURT: What about Count 3?

16 MS. KRASINSKI: He's right. It's in.

17 THE COURT: I tried to quote. I quoted Count 3 as
18 between in or about, and you're telling me you did on or
19 about. What's the superseding say?

20 MR. DAVIS: So the superseding for present Count 2,
21 which is where I was raising this, is between on or about.

22 THE COURT: All right. And then tell me what Count
23 3 says.

24 MR. DAVIS: Count 3 says between in or about June
25 15th.

1 THE COURT: Okay. So I've got it right on 3, and I
2 just should have between on or about on Count 2, okay?

3 MR. DAVIS: Correct.

4 THE COURT: Okay. Good.

5 Yeah, because I caught that on 3, but I didn't go
6 back and catch it on 2.

7 Okay. No other changes.

8 Let me see. So I would ask you, one of you, to
9 take -- there are just two pages here. Scan those and send
10 them to Lorraine and say those are two more changes that the
11 judge would like and could she send me an amended set.

12 The other thing is, have you folks prepared a
13 composite indictment yet?

14 MR. DAVIS: Yes, we have.

15 THE COURT: All right. Could you scan that and
16 send it to her and ask her if she could draft me a verdict
17 form just setting forth Count 1, the description of the charge
18 the way it's charged in the indictment, Count 2, guilty, not
19 guilty, foreperson. She knows how to set up a verdict form,
20 and if she could e-mail me a revised version of that.

21 Vinny, you can wait till we bring the jury in. We
22 can get going and then you can do that at a break or once I
23 get the case started, okay?

24 Are we ready for the jury? Okay. Good. Thanks.

25 (IN COURT - JURY PRESENT)

1 (Continued direct examination of Christopher Cantwell
2 previously prepared under separate cover)

3 THE COURT: All right. Does the government have
4 any rebuttal case?

5 MS. KRASINSKI: No, your Honor.

6 THE COURT: All right.

7 Members of the jury, you've now heard all the
8 evidence in the case that you're going to hear. What's left
9 are closing arguments and jury instructions.

10 We will break until 12:45, you can have some lunch,
11 and I will have the closings, first the government's closing
12 and then the defense closing, and then a brief rebuttal
13 closing by the government. Then we'll take another break.
14 I'll give you -- I'll read you the jury instructions that I
15 will also give you in paper when you deliberate, and then
16 you'll be free to begin your deliberations.

17 So have a nice lunch break. We'll see you back
18 here at 12:45.

19 (IN COURT - NO JURY PRESENT)

20 MR. LEVIN: Your Honor, the defense renews its Rule
21 29 motion on the same grounds as argued previously.

22 THE COURT: All right. And understood and
23 preserved, and I deny your motion.

24 Is there anything -- I have a verdict form. It's
25 very straightforward. You can just take a look at it. If you

1 have a problem with it, let me know. The instructions will be
2 as we agreed.

3 I'm sorry. You wanted to present an argument on
4 the provocation defense instruction.

5 MR. LEVIN: Yes, your Honor. Just briefly.

6 THE COURT: Everyone else can be seated.

7 MR. LEVIN: We do object to the section of the
8 draft jury instructions on the bottom of page 20, top of page
9 21, the title is Provocation Not a Defense.

10 The problem with this instruction from our
11 standpoint is it doesn't define provocation. It doesn't
12 define defense. It's confusing. It's misleading as to the
13 correct standard of the law or at least does not adequately
14 inform the jury on the law.

15 THE COURT: All right. At the break -- wait. I'll
16 let you finish, but at the break I really need your help. So
17 you need to give me an adequate definition of provocation that
18 you want me to -- that if I'm going to give it, you give me
19 the form that legally is sufficient. Give it to me after the
20 lunch break so that I can consider it in light of the case
21 law.

22 It's not enough just to tell me you don't define
23 provocation. You should say, I object to you giving the
24 instruction altogether, but if you are going to give an
25 instruction on provocation, here's what I legally think you

1 should give.

2 MR. LEVIN: Okay. I'm prepared to go into that.
3 That was just the beginning.

4 We're basing our objection on In Re: Winship, 397
5 U.S. 358, a U.S. Supreme Court case which states that the
6 defendant has a due process right to insist that the
7 government prove beyond a reasonable doubt each and every
8 element of the crime with which he's charged.

9 From our standpoint, anything that lightens that
10 burden potentially violates due process.

11 We're citing also two cases from the Second
12 Circuit, U.S. versus Absolom, A-B-S-O-L-O-M, 305 Federal
13 Appendix 786. That's a 2009 Second Circuit case.

14 And U.S. versus Abelis, A-B-E-L-I-S.

15 THE COURT: Let me stop you. I have a law clerk in
16 the room.

17 Please write down any case citations he gives
18 because I'm going to have to read them over the break.

19 MR. LEVIN: U.S. versus Abelis, 146 F.3d 73.
20 Abelis is A-B-E-L-I-S. It's a 1998 Second Circuit opinion.

21 I'm citing these for the proposition that a jury
22 instruction is erroneous if it misleads the jury as to the
23 correct legal standard or does not adequately inform the jury
24 on the law.

25 And the argument we're making is that while

1 provocation is not a complete defense to the charges in the
2 sense that if the government meets its burden of proving
3 beyond a reasonable doubt every element of the charges,
4 evidence of provocation -- I'm sorry. In the sense that if
5 the government meets its burden of proving beyond a reasonable
6 doubt every element of the charges, evidence of provocation
7 does not negate criminal culpability. However, it is
8 certainly part of a defendant's defense, and evidence of
9 provocation can be relied upon by the jury to determine
10 whether the government has met its burden to prove beyond a
11 reasonable document every element of the charges.

12 The defense has not --

13 THE COURT: That completely -- I mean, I know
14 you're just reading something, your notes, but that completely
15 confuses me. I don't understand what you're saying.

16 How does evidence of provocation help you
17 demonstrate to the jury that the government has not proved the
18 elements of its case?

19 I want to be clear. I want help from the defense.
20 Explain to me the additional language you want. But just
21 going on like this really isn't helping me at all. So help me
22 understand.

23 You apparently have a theory that has yet to be
24 articulated, despite my raising it with you over and over and
25 over again during the course of the trial, as to how -- you

1 raised in your opening statement, which was obviously a
2 provocation defense, how that provocation defense undermines
3 the government's ability to prove its case. That's what I --
4 I've been asking for this for days, so please answer it now so
5 that I can understand your argument.

6 MR. LEVIN: Okay. I will.

7 Your Honor, this was an antagonistic relationship
8 between these two men. This was a relationship based on
9 insults back and forth. It ramped up to a particular level.

10 In the jury instructions which the Court has
11 drafted it says: In determining whether the defendant's
12 communication was sent with the intent to extort, you may
13 consider all circumstances surrounding the making of the
14 communication. For example, you may consider language,
15 specificity, frequency, context, relationship between the
16 defendant and the threat recipient, the recipient's response,
17 any previous threat made by the defendant. All these are
18 things in which --

19 THE COURT: That's why -- as I've made clear to you
20 from days before the start of the trial through every single
21 day of the trial, I have erred on the side of caution in
22 allowing you to put in contextual evidence.

23 I am willing -- if you want to give me some
24 language about provocation evidence can be considered in
25 context in evaluating whether the government has proved the

1 elements of its case, I've been willing from the beginning to
2 do that and I'm just waiting for you to give it to me.

3 MR. LEVIN: We're not asking for a provocation
4 instruction, your Honor, but --

5 THE COURT: No, but I'm saying to you -- you know
6 full well what you are doing. It is in your opening
7 statement. It is not a -- you didn't tie it to context.
8 You're inviting the jury to find the defendant not guilty
9 because he was provoked by Mr. Lambert, and that is not a
10 legal basis on which a jury could find the defendant not
11 guilty.

12 I'm very willing to give any reasonable additional
13 language on provocation that you want me to give understanding
14 that you have preserved your objection to the entire concept
15 of provocation. You say, don't say a darn word about it,
16 Judge, and I've heard you on that. I understand your
17 objection on that. Your objection on that is overruled.

18 MR. LEVIN: Okay.

19 THE COURT: I am now explaining to you that I am
20 asking for your help to say, all right, Judge -- the judge
21 doesn't agree with me on this, but the judge has asked me over
22 and over and over again to explain how I should instruct on
23 this particular issue.

24 And so I've been asking and asking and asking, and
25 I'm now asking again, will you please give it to me.

1 MR. LEVIN: I have two suggestions, your Honor.

2 If the Court is going to give the instruction over
3 the defendant's objection, we would ask that it be amended to
4 read as follows: "Evidence of provocation may be relied upon
5 to determine whether the government has met its burden to
6 prove beyond a reasonable doubt every element of the charges
7 in this case. If you find that the government has met its
8 burden of proving beyond a reasonable doubt every element of
9 the charges, however, the evidence of provocation does not
10 negate the defendant's criminal culpability."

11 And then the other thing is --

12 THE COURT: Wait. How does that strike you?

13 MR. DAVIS: Evidence of provocation is not relevant
14 to proof of intent to extort or proof of intent to threat.

15 THE COURT: No, but see -- you're absolutely right
16 as a matter of law, but here's the challenge. What I've
17 understood all along -- to the extent I can understand what
18 the defense is, it's a context defense. There are certain
19 aspects of the charges against the defendant that require the
20 jury to make an assessment of how a reasonable person in the
21 victim's position would receive communications, and I think
22 the defendant's argument, to the extent I can discern one, is
23 there's an argument that these people exist in a subculture
24 that we ordinary people don't understand. It's a subculture
25 where people say things to each other that ordinary people

1 would find so shocking and reprehensible, and in order to
2 flesh that out and tell the truthful story, the jury needs to
3 hear about Mr. Cantwell's anger.

4 His anger is not a defense. It doesn't undermine
5 the charge, but the context in which this entire communication
6 occurred, including Mr. Cantwell's anger, should be considered
7 by the jury in determining whether a person in the position of
8 the victim would reasonably understand the communications at
9 issue to be qualifying communications.

10 To the extent I can make any sense of your defense,
11 that's what it is.

12 MR. LEVIN: That's right, your Honor. That's
13 exactly right.

14 THE COURT: Okay. I wish you could have
15 articulated it for me at some point during my many, many
16 requests to help define it, to do that. I've been spending
17 days trying to understand what you're doing, and that's how I
18 understand it. So I've got it right, right?

19 So the language that you're proposing does not
20 strike me as problematic.

21 Do you have a problem with that, Mr. Davis?

22 MR. DAVIS: Yes, your Honor.

23 THE COURT: All right. We need to see it in
24 writing. Type it up. Submit it. I'll look at it after lunch
25 so I and Mr. Davis can evaluate the specific language you're

1 proposing.

2 That's what I had hoped we would have gotten into
3 last night when I was here until 7:00, 7:30 trying to address
4 suggestions that you had.

5 We're doing it late in the process, but you type it
6 up. You submit it. I'll look at it. Mr. Davis will look at
7 it. We'll come back after lunch and I'll evaluate it, but I'm
8 very willing to give additional language.

9 MR. LEVIN: The other problem with the instruction
10 here is it says: You may consider this evidence only for the
11 purpose of understanding the context of the relationship
12 between the defendant and victim one.

13 And when you go back to that jury instruction for
14 Count 1, it talks about than just the context. It talks
15 about --

16 THE COURT: Well, I narrowed that language at your
17 request from last night, by the way.

18 MR. LEVIN: Right.

19 THE COURT: It was broader and you said, could you
20 narrow it, which I did.

21 MR. LEVIN: Yes, you did. You narrowed it by
22 taking --

23 THE COURT: So I granted your request and now
24 you're telling me it's too narrow.

25 MR. LEVIN: I'm just -- in line with the requests

1 that we made, I'm saying that there are other things in which
2 its relevant to.

3 I mean, it's relevant evidence I think, and the
4 government has argued its relevant and we've argued it's
5 relevant and --

6 THE COURT: It's relevant for motive on the
7 government's part because his anger and frustration is a
8 motive for him to commit the crime. So all of that evidence
9 of anger and frustration is relevant on motive.

10 So if you're afraid the government is being denied
11 the opportunity to argue it for motive, I'll add they can
12 consider it for motive.

13 What else do you want it to be considered for?

14 MR. LEVIN: We want it to be considered for all the
15 things that are listed in that jury instruction on page 14 in
16 determining --

17 THE COURT: I'm happy to incorporate and repeat.

18 To be clear, what you want me to do essentially is
19 read it twice to the jury. Read it once when I had it in the
20 original charge and read it again with respect to provocation.
21 You propose language to that effect and I'll do it.

22 MR. LEVIN: Right. To be clear, we're objecting to
23 the instruction altogether.

24 THE COURT: You have preserved your argument that
25 there should be no word about provocation in the instructions.

1 That objection is overruled.

2 I am now asking for your help in what additional
3 language to add given the fact that you and I disagree about
4 whether the word provocation should be in my instruction.

5 MR. LEVIN: Yes.

6 THE COURT: You have a right to try to convince the
7 Court of Appeals that there should never have been any
8 reference to the word provocation.

9 MR. LEVIN: Thank you.

10 THE COURT: But I have to make the decision. I
11 have made it.

12 Now, given that I have made it, I need your help in
13 building back into the instruction I'm going to give
14 everything that you think needs to be in there recognizing
15 your argument that there's just no way to cure the egregious
16 error I have committed, okay?

17 MR. LEVIN: Thank you.

18 THE COURT: So you'll present it to me in writing.
19 I'm happy to reread into that instruction the portion of the
20 instruction that I crafted specifically to try to allow the
21 jury to evaluate as best I could understand was your defense,
22 but I'm happy to repeat it again in the provocation and make
23 clear to them that evidence about Mr. Cantwell's anger or the
24 actions that they took as to him is evidence they can consider
25 in context in evaluating whether the government has proved its

1 charges, but provocation is not a defense, okay?

2 MR. LEVIN: Thank you.

3 THE COURT: There's a way to do this. I mean, we
4 have to be careful with the language, and that's why I want
5 your help.

6 So bring it back to me and relatively quickly. I'm
7 going to go out and grab a sandwich, and then I'll be back
8 looking for this and trying to edit it up while you guys are
9 doing your closing arguments.

10 MR. LEVIN: I'll e-mail it to everyone, including
11 Vinny. Is that okay?

12 THE COURT: All right.

13 Anything else you want to say on it?

14 MR. DAVIS: Your Honor, could we have until
15 1 o'clock in light of the hour just because of lunch and we
16 have to have go back and get our stuff?

17 THE COURT: Yeah, yeah, yeah.

18 MR. DAVIS: Thank you.

19 (RECESS)
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C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 5-4-21

/s/ Susan M. Bateman
SUSAN M. BATEMAN, RPR, CRR